(8)

No. 85-701



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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FEDERAL ELECTION COMMISSION,
*Appellant,*

v.

MASSACHUSETTS CITIZENS FOR LIFE, INC.,
*Appellee.*

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**On Appeal from the United States Court of Appeals for the First Circuit**

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## BRIEF FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA AS AMICUS CURIAE

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JAMES J. FEATHERSTONE *
SANTARELLI, SMITH, KRAUT & CARROCCIO
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 466-6800

RICHARD E. GARDINER
NATIONAL RIFLE ASSOCIATION OF AMERICA
1600 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record

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### INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

Counsel for each party has consented to the filing of this brief, as indicated by letters filed with the Clerk of the Court. In its brief, NRA urges the Court to affirm the decision below.

NRA is a nonpartisan, nonprofit corporation of approximately three million members. First among its purposes is the defense of the Constitution of the United States, especially of the right of each law obedient American citizen to exercise the right to keep and bear arms, as guaranteed by the Second Amendment, in order that the people can exercise their individual rights of self-preservation and defense of family and property, as well as serve effectively in the appropriate militia for the defense of the Republic and the individual liberty of its citizens.

In support of this objective, the NRA and its political committee, a separate segregated fund within the meaning of the Federal Election Campaign Act, participate in federal elections by making contributions and expenditures to support candidates with whom the NRA agrees. The Federal Election Commission began a civil action against NRA and its committee in the United States District Court for the District of Columbia, alleging expenditures, which were in fact independent, in violation of 2 U.S.C. 441b. The parties have moved for summary judgment and a decision is awaited. The NRA has taken the position that 2 U.S.C. 441b does not forbid an independent expenditure and that, if it did, it would be unconstitutional in violation of the First Amendment.

## SUMMARY OF ARGUMENT

1. Section 441b does not prohibit an independent expenditure by a corporation or labor organization since the definition of "contribution or expenditure," in that section, encompasses only direct and indirect payments *to* specified political entities. The statute, therefore, is "clear and unambiguous," and this Court should give effect to the unambiguously expressed intent of Congress in accordance with *Federal Reserve Board v. Dimension Financial*, 88 L.Ed.2d 691, 698 (1986).

2. The court below was incorrect in holding that the definition of "expenditure" in 2 U.S.C. 431(9)(A)(i) applies to Section 441b. The application of this and other definitions in 2 U.S.C. 431, including that of "person," to corporations and labor organizations, would permit corporations and labor organizations to make reportable contributions within the limits allowed by 2 U.S.C. 441a(a)(1). Nonetheless, even assuming that the section 431(9)(A)(i) definition applies, section 441b is not thereby made ambiguous since the definition in section 431(9)(A)(i) also does not include an independent expenditure within its scope. Because there is no ambi-



guity, there is no necessity to search the legislative history of section 441b to find whether it prohibits independent expenditures.

3. Section 441b is a penal statute, violations of which are punishable by 2 U.S.C. 437g(d). If, therefore, section 441b is regarded as ambiguous, it must be strictly construed and any ambiguity must be resolved in favor of lenity. This rule is applicable although criminal charges have not been brought against Massachusetts Citizens For Life, Inc., since it is a criminal statute the Court must interpret, and there cannot be one construction for the Federal Election Commission and another for the Department of Justice.

4. The legislative history of section 441b was thoroughly reviewed by this Court in *United States v. C.I.O.*, 335 U.S. 106 (1948), *United States v. U.A.W.*, 352 U.S. 567 (1957), and *Pipefitters v. United States*, 407 U.S. 385 (1972), and the opinions in those cases offer no support for the position that section 441b prohibits an independent expenditure and, in fact, prove otherwise. In any event, no corporation or labor organization should be subject to criminal charges on the basis of an ambiguous statute and an ambiguous legislative history. The Commission's remedy, therefore, is to ask Congress to amend section 441b.

5. If section 441b is construed to prohibit the independent expenditures at issue in this case, it would violate the First Amendment as applied. In *Buckley v. Valeo*, 424 U.S. 1 (1976), although this Court sustained limits on contributions, it found that the governmental interest in preventing corruption was inadequate to justify a ceiling on independent expenditures by individuals. The Court explained that the creation of political debt, and hence corruption, the only constitutionally sufficient justification, arises from contributions to candidates, not independent expenditures. This Court has also recog-

nized, in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), that Congress has not demonstrated the existence of a danger of real or apparent corruption in independent expenditures by corporations. Moreover, a ban on independent expenditures by corporations would restrict the institutional press, whose communications are not entitled to greater constitutional protection than other corporations and which does not have a monopoly either on the First Amendment or the ability to enlighten.

## ARGUMENT

### I. SECTION 441b DOES NOT PROHIBIT AN INDEPENDENT EXPENDITURE BY A CORPORATION

Section 441b (J.S. App. 75a)[1] makes it unlawful for any corporation or labor organization to make a "contribution or expenditure" in connection with any federal election. The term "contribution or expenditure" is defined in section 441b(b)(2), in relevant part, to include:

> any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . *to any candidate, campaign committee, or political party or organization*, in connection with any election . . . (Emphasis added).

It is obvious from a reading of this definition that it does not encompass an independent expenditure, which is defined, at 2 U.S.C. 431(17).[2] The definition of "contribution or expenditure" clearly confines itself to direct and indirect payments *to* specifically named political entities, *i.e.*, "any candidate, campaign committee, or political party or organization . . ."[3]

An independent expenditure, however, excludes the possibility of its being received by "any candidate, campaign committee or political party or organization," since any payment *to* one of these entities could, of necessity, occur only with the cooperation of, and in concert with, the recipient "candidate, campaign committee or political party or organization." The essence of an independent expenditure is that it has no cooperating or consulting recipient, since such concert would convert an independent expenditure into an indirect contribution. In *Buckley v. Valeo*, 424 U.S. 1, 46 (1976), this Court affirmed that expenditures coordinated with the candidate are treated as contributions rather than independent expenditures, saying:

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[1] "J.S. App." references are to the appendix in the jurisdictional statement filed by the Federal Election Commission.

[2] Section 431(17) provides:

> "The term 'independent expenditure' means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate."

[3] In *FEC v. National Right to Work Committee*, 459 U.S. 197, 199, n.1 (1982), this Court stated:

> . . . The Federal Election Campaign Act of 1971 (Act) makes it "unlawful for . . . any corporation . . . to make a contribution or expenditure in connection with" certain federal elections. 2 U.S.C. § 441b(a). The term "contribution" is defined broadly . . . to include any sort of *transfer* of money or services *to various political entities* . . . (Emphasis added).

This statement recognizes that a payment, to come within the definition of "contribution or expenditure" in section 441b, must be *transferred to* and received by one of the political entities named in the definition of "contribution or expenditure," *i.e.*, "a candidate, campaign committee or political party or organization." Also, in *FEC v. National Conservative PAC*, 84 L.Ed.2d 455, 469 (1985), this Court noted that, in *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982), it considered "a rather intricate provision of the Federal Election Campaign Act dealing with the prohibition of corporate campaign contributions *to* political candidates . . ." (Emphasis added).

> . . . controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act.

Further, the fact that section 441b(a) specifically makes it unlawful "for any candidate, political committee, or other person knowingly to accept or receive" any contribution prohibited by the section, emphasizes that the payment prohibited is a direct or indirect *coordinated* contribution. Congress obviously wished to assure, since it took both donor and recipient to violate section 441b, that both should be punished.[4] The recipient can obviously be only the beneficiary candidate or political committee, or person acting on behalf of either entity.

Since section 441b is clear and unambiguous in requiring a recipient, thus excluding an uncoordinated or independent expenditure, the teaching of *Federal Reserve Board v. Dimension Financial*, 88 L.Ed.2d 691, 698 (1986), applies:

> If the statute is clear and unambiguous "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.

The Court also said:

> The "plain purpose" of legislation, however, is determined in the first instance with reference to the plain language of the statute itself. *Richards v.*

[4] The contribution would not be complete unless accepted. There could, moreover, be no attempt to make a contribution which was rejected since there is no "attempt" provision in section 441b and there is no general attempt statute in the United States Code.



> *United States*, 369 U.S. 1 (1962). Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent. 88 L.Ed.2d at 702.

## II. SECTION 441b IS NOT AMBIGUOUS

Notwithstanding the plain language of section 441b, the court below found that section 441b was ambiguous, stating that the "presence of the word 'include' in section 441b leaves open the possibility that 'contribution or expenditure' could encompass more than payments *to* a candidate, campaign committee, or business organization." (J.S. App. 8a). (Emphasis in original). The court stated that "the plain language of the statute suggests that 'expenditure' . . . includes *but is not limited to* contributions *to* candidates, campaign committees, or political organizations." (App. 8a). (Emphasis in original). The court of appeals thus found applicable to section 441b the definition of expenditure in 2 U.S.C. 431 (9)(A)(i), which states:

> The term "expenditure" includes—any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.

The effect of the specific definition of "contribution or expenditure" in section 441b(b)(2) may not be avoided,

however, by claiming that the definitions of "expenditure" in 2 U.S.C. 431(9)(A)(i) or of "contribution" in 2 U.S.C. 431(8)(A)(i)[5] are also applicable to section 441b since, if those two section 431 definitions were considered applicable to the contribution activities of corporations and labor organizations, so would be the other definitions in section 431. In that event, the definition of *person* in 2 U.S.C. 431(11),[6] which includes corporations and labor organizations, would also apply; thus, corporations and labor organizations would be permitted to make contributions to candidates and political committees up to the maximum amounts specified in 2 U.S.C. 441a (a)(1).[7]

This Court observed, however, in *California Medical Association v. F.E.C.*, 453 U.S. 182, 185, n. 2 (1981),

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[5] 2 U.S.C. 431(8)(A)(i) provides that the term "contribution" includes—"any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office . . ." If the reasoning of the court of appeals is correct, this definition of "contribution" would also be applicable to section 441b.

[6] 2 U.S.C. 431(11) provides that the term "person" includes "an individual partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government."

[7] 2 U.S.C. 441a(a) provides:

> (1) No person shall make contributions—
>
> (a) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;
>
> (b) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or
>
> (c) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.



that corporations and labor organizations are not governed by 2 U.S.C. 441a(a)(1), stating:

> Section 441a(a)(1)(C) provides in pertinent part that "[n]o person shall make contributions . . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000." The Act defines the term "person" to include "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons." *Corporations and labor organizations*, however, are prohibited by 2 U.S.C. § 441b(a), from making any contributions to political committees other than the special segregated funds authorized by § 441b(b)(2)(C), and hence these entities *are not governed by § 441a(a)(1)(C)*. (Emphasis added).

This declaration makes it clear that, because of section 441b's prohibitions of contributions *to* various political entities, corporations cannot make such contributions to candidates and political committees up to the limits allowed by 2 U.S.C. 441a(a)(1). Thus, the definition of "person" in section 431(11), which would bring corporations within the ambit of 2 U.S.C. 441a(a)(1), does not apply to the contribution activities of corporations. It thus follows that, if the section 431(11) definition of "person" does not govern the contribution activities of corporations, then none of the section 431 definitions relating to contributions or expenditures apply to corporations. Application of the section 431 definitions of "contribution" and "expenditure" to corporations and labor organizations would also make applicable the reporting and disclosure provisions these definitions have been designed to implement, resulting in corporations and unions being freed from the prohibitions of section 441b. This is because the reporting and disclosure provisions of the Federal Election Campaign Act, including section 2 U.S.C. 431, define the "contribution" and "expenditure" activities which are *permitted* under the Federal Election Campaign Act so long as they are within

specified limits and reported, whereas section 441b prohibits certain narrowly defined conduct by corporations and labor organizations. Corporations and labor organizations are dealt with separately under section 441b precisely because their contribution activities are not permitted, defined, limited, and made reportable by the other provisions of the Federal Election Campaign Act.

Contrary to the conclusion of the court of appeals, application of the section 431(9)(A)(i) definition of expenditure to section 441b does not require a finding that the latter section is ambiguous, since the definition of "expenditure" in section 431(9)(A)(i) also does not include the concept of independent expenditure. When section 431(17) uses the term "expenditure" it obviously uses that term as it is defined in section 431(9)(A)(i), with the additional requirement that to come within the ambit of section 431(17) an expenditure must not be coordinated with a candidate or his committee or agent. The expenditure defined in section 431(9)(A)(i) must, of course, then be a *coordinated* expenditure. If this were not so, the definition in section 431(17) would be superfluous.

Since neither the definition in section 441b nor the definition in section 431(9)(A)(i) encompasses an uncoordinated or independent expenditure, there is no ambiguity in the statute and therefore no reason to resort to the legislative history of section 441b to determine whether it covers the independent expenditure activity of the Massachusetts Citizens For Life, Inc.[8]

[8] Moreover, the court below misinterpreted the word "includes" in 2 U.S.C. 441b, stating that the presence of this word leaves open the possibility that "contribution or expenditure" could encompass more than payments to a candidate, campaign committee, or political entity because the word "includes" is usually a term of enlargement, not limitation. Whatever value that analysis may have in other contexts, it is not applicable to section 441b. Section 441b(b)(2), in defining "contribution or expenditure" uses the word "includes" in defining what a "contribution or expenditure" is and then states specifically what the term "shall not include," by enumerating the activities set out in subsections (A), (B) and (C). (App. 76a-77a). If the statute did not specify what the term "contribution or expenditure" did *not* include, the reasoning of the First Circuit might be applied to reach the conclusion that the activities specified in subsections A, B, and C were encompassed by the definition of "contribution or expenditure." Congress, however, made the definition of "contribution or expenditure" in section 441b symmetrical, by specifying the activities which are included and those which are not.

Further, the authority cited by the First Circuit, *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968), as quoted by 2A N. Singer, *Sutherland Statutes and Statutory Construction* 133 (4th ed. 1984) is quite shaky. That case relied upon *United States v. Gertz*, 249 F.2d 662, 666 (9th Cir. 1957) which pointed out, at n.3, that it is not necessarily true that "includes" is a term of enlargement. *Gertz* in turn cited *Blankenship v. Western Union Telephone Co.*, 161 F.2d 168 (4th Cir. 1947), which regarded "includes" as a term of limitation, not enlargement.



## III. SECTION 441b IS A PENAL STATUTE AND MUST BE CONSTRUED AS SUCH

Section 441b, if regarded as ambiguous, must be construed in favor of lenity, since it is a penal statute, violations of which are subject to punishment under 2 U.S.C. 437g(d).[9]

It has long been the rule that a criminal statute must be strictly construed and that any ambiguity must be resolved in favor of lenity. *United States v. Enmons*, 410 U.S. 396, 411 (1973); *United States v. Bass*, 404 U.S. 336, 347 (1971), *Rewis v. United States*, 401 U.S. 808, 812 (1971). In *United States v. Boston & Maine RR*, 380 U.S. 157, 160 (1965), this Court said that the rule

[9] 2 U.S.C. 437g(d) provides, in relevant part: "(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both . . ."

requiring strict construction of criminal statutes was taught by the Court's cases from *United States v. Wiltberger*, 5 Wheat. 76, a case in which Chief Justice Marshall stated that "[t]he rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself." This Court in *Boston & Maine RR* also delivered a caution particularly applicable to the construction of section 441b:

> The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition. *United States v. Weitzel*, 246 U.S. 533. [1918]. 380 U.S. at 160.

*Weitzel*, cited in *Boston & Maine RR*, mentioned another important principle which governs the construction of section 441b:

> Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive. 246 U.S. at 543.

Any attempt, moreover, to interpret section 441b as prohibiting independent expenditures "slights the wording of the statue." *United States v. Enmons*, at 399, *Williams v. United States*, 458 U.S. 279, 286 (1982). As this Court emphasized in *United States v. Campos-Serrano*, 404 U.S. 293, 299 (1971), the actual wording of the statute should be controlling:

> The principle of strict construction of criminal statutes demands that some determinate limits be established based upon *the actual words of the statute.* (Emphasis added).

Section 441b must be construed as a criminal statute despite the fact that criminal charges have not been brought against Massachusetts Citizens For Life, Inc.[10]

[10] Criminal prosecutions are undertaken by the United States Department of Justice under section 441b, as is reflected, for example, in Federal Election Commission Advisory Opinion 1984-52, dated November 30, 1984, which discussed a Grand Jury investigation in Chicago which led to criminal charges of illegal corporate contributions in violation of section 441b.



In *Federal Communications Commission v. American Broadcasting Company, Inc., et al.*, 374 U.S. 284 (1953), this Court stated:

> It is true, as contended by the Commission, that these are not criminal cases, but *it is a criminal statute that we must interpret.* There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well established principle that penal statutes are to be construed strictly. 347 U.S. at 296. (Emphasis added).

The cases clearly suggest the impropriety of the Commission's attempt to ignore the definition of "contribution or expenditure" contained in 2 U.S.C. 441b(b)(2) and to expand the reach of this penal statute by resorting to legislative history. Despite this effort, however, section 441b remains a penal statute and must be construed as such.

## IV. THE EVOLUTION OF THE PROHIBITION OF CORPORATE AND UNION CONTRIBUTIONS INDICATES SECTION 441b DOES NOT PROHIBIT INDEPENDENT EXPENDITURES

The prohibition of contributions to candidates by corporations and unions has been considered by this Court in *United States v. CIO*, 335 U.S. 106 (1948), *United States v. U.A.W.*, 352 U.S. 567 (1957) and *Pipefitters v. United States*, 407 U.S. 385 (1972). Each case dis-

cussed the evolution of the prohibition and its legislative history. None of the cases completely resolved First Amendment questions, but each reflected this Court's sensitivity to the constitutional problems raised by restricting the speech of corporations and labor organizations.

*United States v. CIO* considered section 313 of the Federal Corrupt Practices Act of 1925, as amended by section 304 of the Labor Management Relations Act of 1947.[11]

The case resulted from an indictment against the CIO, a labor organization, and its president, based on the publication and distribution of an issue of a periodical, *The CIO News*, published by the union from the funds of the union and with the consent of its president. The issue urged CIO members to vote for a particular Maryland candidate for Congress. This Court declined to decide whether section 313 abridged First Amendment free-

[11] Section 313 provided, in pertinent part:

"It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than $1,000 or imprisoned for not more than one year, or both. . . ."



doms, concluding that the indictment did not charge acts embraced within the scope of section 313.

This Court pointed out that the indictment did not allege "the source of the CIO funds" (335 U.S. at 111) and stated:

> The funds used may have been obtained from subscriptions of its readers or from portions of CIO membership dues, directly allocated by the members to pay for the "News," or from other general or special receipts.
>
> We do not read the indictment as charging an expenditure by the CIO in circulating free copies to nonsubscribers, nonpurchasers or among citizens not entitled to receive copies of "The CIO News," as members of the union. . . . We conclude that the indictment charges nothing more as to the extras than that extra copies of the "News" were published for distribution and were distributed in regular course to members or purchasers and that no allegation has been made of expenditures for "free" distribution of the paper to those not regularly entitled to receive it. 355 U.S. at 111.

This Court said that the construction of section 313 turned on the range of the word "expenditure" added by section 304 of the Labor Management Relations Act, finding that the word was *not* used as "a word of art" (335 U.S. at 112) and that the "applicability of the word to prohibition of particular acts must be determined from the circumstances surrounding its employment." (*Id.* at 112). This Court then reviewed the legislative antecedents of section 304, including the statute immediately preceding it, the War Labor Disputes Act of 1943. According to this Court, when Congress was considering the Labor Management Relations Act of 1947, it found a serious defect in the Federal Corrupt Practices Act, in that the word "contribution" was thought to be confined to *direct* gifts or direct payments. (*Id.* at 115). Congress therefore extended the prohibition of section 313

to "expenditures" since "it was obvious that the statute as construed could easily be circumvented through *indirect contributions*" . . . . (*Id.* at 115). (Emphasis added).

This Court, moreover, found in the Senate debates definite indication that Congress did not intend to include as an expenditure the costs of the publication described in the indictment.

This Court then reviewed the Senate debates relating to the Labor Management Relations Act of 1947, and observed:

> If § 313 were construed to prohibit the publication, by corporations and unions in the regular course of conducting their affairs, of periodicals advising their members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election to office of men, espousing such measures, the gravest doubt would arise in our minds as to its constitutionality. In so far as some of the many statements made on the floor of Congress may indicate the thought, at the time, by certain members of Congress that the language of § 313 carried a restrictive meaning in conflict with that which we have adopted, we hold that the language itself, coupled with the dangers of unconstitutionality, supports the interpretation which we have placed upon it. *Id.* at 121-122.

This Court expressed the view that "expenditures" was added to eradicate the doubt that had been raised as to the reach of "contribution," *not to extend greatly the reach of the section.* (*Id.* at 122.) This Court did *not*, moreover, adopt the view it attributed to informed opponents and proponents that section 313 went so far as to forbid periodicals in the regular course of publication from taking part in pending elections where there was not segregated subscription, advertising, or sales monies adequate for its support. It also indicated that, although a periodical financed by a corporation or labor



union for the purpose of supporting candidates is on a different level from newspapers devoted solely to the dissemination of news, the line separating the two classes is not clear; and that, in the absence of a definite statutory demarcation, the location of that line must await the full development of facts in individual cases.

The Court explained:

> *It would require explicit words in an act to convince us that Congress intended to bar a trade journal, a house organ or a newspaper, published by a corporation, from expressing views on candidates or political proposals in the regular course of its publication.* . . . We are unwilling to say that Congress by its prohibition against corporations or labor organizations making an "expenditure in connection with any election" of candidates for federal office intended to outlaw such a publication. 335 U.S. at 123. (Emphasis added).

This Court then specifically stated that it was unwilling to say that Congress, by its prohibition against corporations or labor organizations making "an expenditure in connection with any election" of candidates for federal office, intended to outlaw the publication with union funds of a regular periodical for the furtherance of the union's aims. 335 U.S. at 123. Obviously, the concept of "independent expenditure," as distinguished from "indirect contribution," had not been developed or articulated at the time of the *CIO* case. In fact, it cannot be assumed that attention had yet focused clearly on the concept of "indirect contribution." It is clear, however, that this Court did not approve an indictment which could be read as forbiding the publication of a newspaper by a union, using treasury funds, to express the views of the union in support of a candidate in a federal election.

This Court next examined the law forbidding the making of a "contribution or expenditure" by a union or

corporation in *United States v. U.A.W.*, 352 U.S. 567 (1957). The law was then codified in 18 U.S.C. 610 and read as it did when considered in *United States v. CIO*, except that language had been added to section 610 to provide a penalty for the recipient of a forbidden contribution or expenditure. In construing 18 U.S.C. 610, this Court again looked at its legislative history, particularly the amendment of section 313 of the Federal Corrupt Practices Act by the Labor Management Relations Act of 1947.

In *U.A.W.*, the union was charged with paying for television broadcasts endorsing the selection of certain persons to be candidates for Congress. The funds were alleged to have come from union dues, not voluntary political contributions. Speaking to the activity by the union, this Court observed:

> To deny that such activity, either on the part of a corporation or a labor organization, constituted an "expenditure in connection with any [federal] election" is to deny the long series of congressional efforts calculated to avoid the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital. More particularly, this Court would have to ignore the history of the statute from the time it was first made applicable to labor organizations. As indicated by the reports of the Congressional Committee that investigated campaign expenditures, it was to embrace precisely the kind of *indirect contribution* alleged in the indictment that Congress amended § 313 to proscribe "expenditures". 352 U.S. at 585. (Emphasis added).[12]

[12] There is absolutely no reason to believe that the "indirect contribution" referred to by the Court is any different than the "controlled or coordinated expenditures" referred to in *Buckley v. Valeo*, 424 U.S. 1, 46, as being treated as contributions under the Federal Election Campaign Act, rather than as independent expenditures.



This Court distinguished *U.A.W.* from *United States v. CIO* by stating that, unlike the political broadcasts in the former case, the communication for which the defendants were indicated in *CIO* was neither directed nor delivered to the public at large. This Court thus stated:

> The evil at which Congress has struck in § 313 is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party. 352 U.S. at 589.

This Court held that the District Court committed error when it dismissed the indictment for having failed to state an offense under the statute. This Court, in allowing the prosecution to proceed, did not address the constitutional issues raised by the union, such as its rights under the First Amendment, stating that only an adjudication on the merits "can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." *Id.* at 591. This Court explained that allegations of the indictment hypothetically framed to elicit a ruling from this Court or based upon misunderstanding of the facts may not survive the test of truth. The questions left unanswered by the record were, according to this Court:

> . . . was the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election? 352 U.S. 591.

This Court went no further than to decide that the indictment stated an offense when it charged that the spending of union treasury money was an expenditure of union funds, constituting an *indirect contribution* within the meaning of 18 U.S.C. 610. The type of "in-

direct contribution" this Court had in mind is illustrated by the following excerpt from this Court's quotation of Senator Taft's explanation of the amending of the statute to encompass expenditure as well as contribution within its meaning:

> . . . If 'contribution' does not mean expenditure, then a candidate for office *could have his corporation friends* publish an advertisement for him in the newspapers every day for a month before election. . . . 352 U.S. at 583. (Emphasis added).[13]

It is thus clear that this Court was dealing with an expenditure made by the union *in cooperation with* the candidate and in accordance with his wishes.[14] This Court went no further, therefore, than to decide that such an indirect contribution made to finance a communication to the general public was covered by section 610. Significantly, this Court did not list as one of the questions unanswered by the record, a question concerning whether there had been consultation or cooperation between the union and the congressional candidates endorsed in the television broadcasts paid for by the union. This is no doubt because such coordination was assumed to have taken place as a natural consequence of the union's political support of a candidate. There is no basis for a belief that, at the time of the election covered by the indictment in *U.A.W.*, unions supporting candidates would make television broadcast decisions on their own. The concept of "independent expenditures" had not yet developed and there is no suggestion in *U.A.W.* that this Court in any way addressed it.

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[13] The Commission, in its brief (p. 15) refers to a 1946 Report of the House Special Committee to Investigate Campaign Expenditures which recommended that the statute be clarified to provide that expenditures constitute violations, whether made with or without the knowledge or consent of candidates. Obviously, as shown by this statement of Senator Taft, the law was not so clarified when it was amended in 1947.

[14] The Commission implies, by stating that "this Court determined long ago that the prohibition of corporate and union 'expenditures' was added to section 441b's predecessor in 1947 for the purpose of reaching expenditures in connection with federal elections that were claimed to be independent of a candidate's campaign" and then discussing *U.A.W.* (Brief of Appellant, at 14), that *U.A.W.* dealt with independent expenditures. Plainly, the Commission's view of *U.A.W.* is erroneous. Moreover, the Commission is wrong in suggesting that the key to the decision in *U.A.W.* was that the indictment "did not allege that the union's expenditures had been approved by or coordinated with any candidate." (Brief for Appellant, at 14) since the opinion contained no such discussion.



The court below stressed that, in *U.A.W.*, this Court found that the evil at which Congress aimed "is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party." (App. at 13a). This is not the critical issue, however, since communications to the public at large can be either uncoordinated or coordinated. It further stated:

> We conclude that section 441b prohibits expenditures in connection with federal elections as well as expenditures made to candidates for federal office. (App. 15a).

Even this statement, of course, falls short of justifying its finding that the independent expenditures made in this case are proscribed, since "expenditures in connection with federal elections," can be coordinated expenditures. As this Court recently reaffirmed in *FEC v. National Conservative PAC*, 84 L.Ed.2d 455 (1985):

> . . . "expenditures in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents," are considered "contributions" under the FECA, 2 U.S.C. § 441a(a)(7)(B)(i), and as such are already subject to FECA's $1,000 and $5,000 limitations on §§ 441a(a)(1), (2). 84 L.Ed. 2d at 466-467.

This Court next construed 18 U.S.C. 610 in *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385 (1972) and held that section 610 does not apply to union contributions and expenditures from political funds financed in some sense by the voluntary donations of employees. *Pipefitters*, however, in no way suggested that a corporation or union was prohibited from using general treasury funds to make an independent expenditure.

The term "contribution or expenditure," moreover, has not since been construed by this Court to cover the concept of an independent expenditure. *F.E.C. v. National Right To Work Committee*, 459 U.S. 197 (1982) contains absolutely no support for the Commission's position in this case. Like *Buckley v. Valeo*, *supra*, it merely affirmed "the importance of preventing both the actual corruption threatened by large financial *contributions* and the eroding of public confidence in the electoral process through the appearance of corruption." 459 U.S. at 208. (Emphasis added). It did not suggest that an independent expenditure was prohibited by 2 U.S.C. 441b.

## V. A PROHIBITION OF INDEPENDENT EXPENDITURES BY CORPORATIONS OR LABOR ORGANIZATIONS WOULD VIOLATE THE FIRST AMENDMENT

This Court instructed in *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) that the contribution and expenditure limitations of the Federal Election Campaign Act operate in an area of the most fundamental First Amendment activities, and that discussion and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.

> The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476. . . . "there is practically universal agreement that a



> major purpose of th[e] Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . ." *Mills v. Alabama*, 384 U.S. 214 (1966).

This Court found it unnecessary, however, to look beyond the Act's primary purposes—to limit the actuality and appearance of corruption resulting from large individual financial contributions—to find a constitutionally sufficient justification for the $1,000 contribution limitation contained in the Act. This Court also sustained the limitations on contributions by political committees and the $25,000 limitation on total contributions during any calendar year, because these restraints prevent evasion of the individual contribution limitation. 424 U.S. at 35, 38.

This Court, nevertheless, found that the governmental interest in preventing corruption was inadequate to justify the ceiling on independent expenditures contained in the 1971 Act, stating:

> the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions. . . . Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

While the independent expenditure ceiling thus fails to serve any substantial governmental interest in

> stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. . . . Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation. 424 U.S. at 46-48.

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court considered a Massachusetts criminal statute that forbad certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals. The highest court of Massachusetts found the statute constitutional, holding that "only when a general political issue materially affects a corporation's business, property or assets may that corporation claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public." 435 U.S. at 772. The Massachusetts Court had framed the issue in the case as whether and to what extent corporations have First Amendment rights. This Court said that the proper question is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons, but whether the Massachusetts law abridges expression that the First Amendment was meant to protect. It then held that the statute did abridge such expression, stating:

> We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation that cannot prove, to the satisfaction of a court, a material effect on its business or property. The "materially affecting" requirement is not an identification of the boundaries of corporate speech etched by the Constitution itself. Rather, it amounts



> to an impermissible legislative prohibition of speech based on the identity of the interests that spokesmen may represent in public debate over controversial issues, and a requirement that the speaker have a sufficiently greater interest in the subject to justify communication. 435 U.S. at 784.

This Court concluded that the Massachusetts law could not survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech and found it invalid because it prohibited protected speech in a manner unjustified by a compelling state interest. (*Id.* at 795).

Although this Court pointed out (435 U.S. at 787, n.26) that it was not dealing with a "challenge [to] the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections," it noted that the "overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts." The creation of a political debt is, of course, the problem which, in *Buckley v. Valeo*, *supra*, this Court found arises as a result of *contributions to candidates*. This Court specifically found in that case that independent expenditures create no such problem. In fact, independent expenditures may very well be unwelcomed by some candidates in an election and, in any event, cannot be viewed as capable of creating a political debt, which could only come into existence if an expenditure were made with the consent of or in coordination with the candidate. In such a case, of course, the expenditure would not be independent but would constitute a contribution. It therefore appears that this Court, when it rejected the limitation on individual independent expenditures in *Buckley*, effectively decided that only contributions are capable of creating political debts.

It is true that this Court left the door open should Congress wish to prohibit corporate independent expenditures and feel itself "able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections." 435 U.S. at 787, n.26. Such a showing of corruption would be extremely difficult, however, not only because the expenditures in question are made without the permission of candidates, but also because of the effect a ban on independent expenditures would have on the institutional press. This Court in *Bellotti* refused to adopt the suggestion that communication by corporate members of the institutional press is entitled to greater constitutional protection than the same communication by banks and business corporations, pointing out that the press does not have a monopoly on either the First Amendment or the ability to enlighten. 435 U.S. at 782. Moreover, in an instructive concurring opinion, Chief Justice Burger emphasized "the difficulty, and perhaps impossibility, of distinguishing, either as a matter of fact or constitutional law, media corporations from corporations such as appellants" in *Bellotti*. 435 U.S. at 796.

In *FEC v. National Conservative PAC*, 84 L.Ed.2d 455 (1985), this Court recently considered independent expenditures in the context of 26 U.S.C. 9012(f), which makes it a criminal offense for political committees to make *independent expenditures* in support of a Presidential candidate who has elected to accept public financing. This Court, quoting from *Buckley v. Valeo*, 424 U.S. 1, 14 (1974) affirmed that "[t]here can be no doubt that the expenditures at issue in this case produce speech at the core of the First Amendment." 85 L.Ed.2d at 467. It also stressed that First Amendment freedom of association was "squarely implicated" in the case. *Id.* at 468.

This Court also stated that it did not need to reach "the question whether a corporation can constitutionally



be restricted in making independent expenditures to influence elections for public office . . . ." (*Id.* at 469), pointing out that, although appellees National Conservative Political Action Committee and Fund For A Conservative Majority were formally incorporated, "this is not a 'corporations' case." *Id.* at 469. This Court did, however, hold that the expenditures by these incorporated committees were entitled to full First Amendment protection and found § 9012(f)'s limitation on independent expenditures by political committees to be "constitutionally infirm". *Id.* at 470.

This Court emphasized that, in *Buckley v. Valeo*, it struck down FECA's limitations on individuals' independent expenditures because it found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or give the appearance of corruption. This Court repeated what it concluded in *Buckley*, that "there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Id.* at 470.

This Court also stated:

> The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view. It is of course hypothetically possible here, as in the case of the independent expenditures forbidden in *Buckley*, that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages. But here, as in *Buckley*, the absence of prearrangement and coordination undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will

be given as a *quid pro quo* for improper commitments from the candidate. On this record, such an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more. *Id.* at 471.

## CONCLUSION

For these reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

JAMES J. FEATHERSTONE *
SANTARELLI, SMITH, KRAUT
& CARROCCIO
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 466-6800

RICHARD E. GARDINER
NATIONAL RIFLE ASSOCIATION
OF AMERICA
1600 Rhode Island Ave., N.W.
Washington, D.C. 20036
(202) 828-6348

* Counsel of Record

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